IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 76-91

SOUND SHIP BUILDING CORPORATION,

Petitioner,

vs.

BETHLEHEM STEEL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Sound Ship Building Corporation petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit entered in this case April 23, 1976.

OPINIONS BELOW

The Memorandum Sur Petition for Rehearing Before the Panel of the Court of Appeals is reported at 533 F.2d 100 and printed *infra* at App. A, p. A1.[1] The original opinion of the Court of Appeals is reported at 533 F.2d 96 and printed *infra* at App. B, p. A7. The opinion of the United States District Court for the District of New Jersey denying petitioner's motion for summary judgment and granting respondent's motion for summary judgment is reported at 387 F. Supp. 252 and printed, *infra* at App. C, p. A12.

1. References to the Record in the District Court are to pages of the Joint Appendix and petitioner's Supplemental Appendix in the Court of Appeals and are designated, respectively, "Ja" and "Sa" followed by the appropriate page number. References to the Appendices hereto are preceded by the designation "App." followed by a letter and the appropriate page number.

JURISDICTION

The decision of the Court of Appeals was filed on January 16, 1976. An order granting an extension of time to February 15, 1976 (a Sunday, followed by a legal holiday) to file a petition for rehearing was filed on January 27, 1976. On February 17, 1976, petitioner filed a petition for rehearing by the original panel. On April 23, 1976, the petition for rehearing was denied by the Court of Appeals. Petitioner invokes the jurisdiction of the Supreme Court under 28 U.S.C. 2101(c).

STATUTES INVOLVED

Petitioner alleges a violation by respondent of section 1 of the Sherman Act (15 U.S.C. §1) which is printed in full at App. D, p. A21 *infra*. Petitioner instituted this action pursuant to section 4 of the Clayton Act (15 U.S.C. §15, which is printed in full at App. E, p. A21 *infra*.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that, in order to show a causal nexus between defendant's anti-competitive action and an antitrust plaintiff's damage, it must be demonstrated that defendant not only illegally foreclosed plaintiff from a desirable business site, but also adversely affected the price plaintiff was compelled to pay for an alternative site.

2. Whether the District Court erred in a summary judgment setting by declining to reject the doctrine of ancillary restraints in upholding a patently anticompetitive covenant obtained by a seller of real property from its purchaser.

3. Whether the District Court erred in adopting, in effect, a rule that any covenant by a purchaser restricting the use of real property is reasonable *per se* if it is obtained in connection with the sale of the restricted property, regardless of its anticompetitive purpose or effect.

STATEMENT OF THE CASE

A. *Background Facts*

Sound Ship was a New York corporation engaged primarily in the business of dry-docking, constructing, repairing, painting and converting non-self-propelled vessels, called "dumb" harbor craft (Ja123a, Ja171a, Ja172a). For about 20 years prior to 1971, Sound Ship had conducted its business at a location in College Point, Queens, New York, under a written lease (Ja220).

Forewarned years before that the College Point lease would not be renewed beyond September, 1971, the Sound Ship principals set about as early as 1968 to locate a new site, and engaged the James H. Burns Company, a real estate firm with special expertise in New York waterfront property, to assist them (Ja134 to Ja138a).

They visited, examined and explored the feasibility of 25 to 30 waterfront sites in New York City, Long Island, New Jersey and Westchester County (Ja177a to Ja179a), but they found only one site particularly suited to Sound Ship's needs (Ja157a to Ja175a). [The lack of alternative sites, acceptable for plaintiff's uses, later was faced by Bethlehem in its attempts to find a site to placate Sound Ship (Sa248a)]. This property was part of a larger tract known as the Mariner's Harbor Industrial Park ("Mariner's Harbor"). The portion available for leasing was fully developed, and Sound Ship had only to move its equipment, set it in place and continue doing business.

The property had been purchased by its present owner, JML Trading Company ("JML"), from Bethlehem in 1964. Bethlehem had once owned and operated four shipyards in this area: this one in Staten Island, two others in Brooklyn, and one in Hoboken (Ja33a). A decline in the

shipbuilding industry prior to 1971 had forced Bethlehem to re-evaluate these holdings and ultimately to sell off three unprofitable sites—the two in Brooklyn and Mariner's Harbor (Ja46a-Ja47a).

In the sale of *each of its three* shipyards, Bethlehem included a deed restriction barring the following use of the land for 20 years:

> "the business of drydocking, building, repairing (including painting below the light load line), or converting ocean-going ships, ferry boats, or harbor craft, [excluding] the drydocking, building repair or conversion of pleasure craft. . ." (Ja9a).

As conceded by Bethlehem (Ja46a to Ja47a), the covenant's purpose was to preclude the use of this property in competition with Bethlehem's one remaining shipyard in Hoboken.

When, in the Spring of 1971, Sound Ship first was shown the Mariner's Harbor property, its principals indicated their immediate interest (Ja150a to Ja152a). Negotiations with the landlord's agent produced an accord on all the essential terms between JML as landlord and Sound Ship as tenant (Ja186a), but prior to execution of a formal written lease, Sound Ship was told of the deed restriction (Ja186a to Ja187a).

In order to remove this impediment to a transaction which both JML and Sound Ship desired to consummate, Klein, the landlord's agent, wrote to Clark, Bethlehem's Real Estate Assistant Manager, asking that defendant:

> ". . . exempt non-self-propelled harbor craft, including non-self-propelled barges for petroleum products, from the proscription in the deed." (Exh. P-1, Ja230a).

Thus, Sound Ship sought only a *partial* release of the contract, a release Bethlehem's Hoboken Shipyard Manager thought "probably wouldn't hurt us" (Ja764a). As Bethlehem's Vice President said in an internal memo: "After new consideration we felt that the removal of the covenant would not affect our Hoboken operation significantly" (Ex. P-16, Ja264a).

Nonetheless, from the developments after this request, a fact finder readily could conclude that Bethlehem was motivated by one goal only—stifling what its management perceived to be a *direct*, immediate and adverse impact upon its Hoboken operation from Sound Ship's use of the Mariner's Harbor facilities. For example, after internal discussions between two Bethlehem officers (Ja42a to Ja47a), one wrote:

> "The basic reasoning for this move is very obvious. This proposed area is in the main stream of all Marine traffic to and from Port Newark and Port Elizabeth. Sound Shipbuilding has three (3) floating drydocks and one (1) Marine railway, and have recently purchased a 10,000 ton floating drydock from Sun Shipbuilding.
>
> Bethlehem's Hoboken Yard has developed the pierside ship repair facility at Port Newark and Port Elizabeth with our portable mobile units with very good results, and prospects of even greater profit capability in the near future.
>
> *We therefore suggest that a negative reply should be submitted to this potential competition in Hoboken's realm of barge construction and ship repair.*" (Ex. P-9, Ja245a; Emphasis added).

The second, in a separate memo, worried about "What comes next" (Exh. P-8B; Ja242a). Another, in a handwritten note, stated:

> "Labor short. No incr. bus. for N.Y.—instead further dilution & problems to exist. operations. We closed SI & 5th St. because not enough bus. for profit. Merchant Mar. going down further." (Exh. P-10; Ja247a).

Finally, Langaker, in charge of collating internal reaction to the requested waiver of the covenant, advised:

> *"The emergence of another competitor . . . would not only jeopardize our profitable activity in the Port Newark/Elizabeth area with our mobile units from a 'work available' point of view—but would also seriously diminish the already insufficient supply of local manpower available should this facility develop into another drydocking competitor. This possibility incidentally, appears very real as I understand from J. D. Ingham—our Hoboken Yard General Manager—who advises me that Sound Ship has three floating docks of its own and recently purchased a 10,000 ton lifting capacity drydock from Sun Shipbuilding.*
>
> It has been our sad experience that the most innocent intention of would-be non-competitive waterfront repair shops have developed into 'sponges' on our trained manpower besides under-bidding our own facilities on pierside work due to drastically lower overhead costs and plant investments. (Exh. P-6; 237a; Emphasis added.)

Further efforts were made to persuade Bethlehem to reconsider and change its decision (Ja101a), and there were additional discussions, meetings, and negotiations among representatives of Bethlehem, Mariner's Harbor and Sound Ship (Sa248a to Sa249a), which were unsuccessful.

The court below found that Bethlehem "later expressed a willingness to accept $250,000," spread over the entire period of the lease in cancellation of the restrictions

and that this was all that was required from Sound Ship (App. B, p. A6) and indeed took strong, exception to plaintiff's position that the record does not permit this conclusion before trial (See App. A. p. A3, and n.2). Nonetheless, in a summary judgment setting plaintiff insists there is ample basis in the record for a finding by a trier of fact in a plenary hearing that Bethlehem would *not* settle for this, and so far as any communications to Sound Ship were concerned, Bethlehem's demands were far greater.

For instance, at first both Williams and Langaker of Bethlehem indicated they were amenable to a partial release of the restriction (Sa249a to Sa250a) for a total payment of $130,000 over a 13-year period (Ja190a), which would have permitted Sound Ship to continue its entire operation at Mariner's Harbor (Ja171a) and Sound Ship was agreeable to such an approach (Sa247a). If *Bethlehem* had not pulled back, then at least there would be a factual basis for the Court of Appeals' conclusion that Sound Ship, by paying Bethlehem's penalty, could have avoided most of its claimed damages, leaving at issue only whether one is compelled to do business with a wrongdoer.

But Bethlehem ultimately shifted its position and demanded $250,000 in full in advance, so far as communications to Sound Ship were concerned (Ja164a-Ja165a, Ja 214a-Ja216a; Sa245a) for a *full* release, which Sound Ship did not require and which Bethlehem reasonably could have anticipated was beyond the financial ability of its victims. Sound Ship officers testified that this was in fact the case (Ja164a, 166a, 167a).

It is true that Bethlehem's Mr. Langaker testified at depositions that in *January, 1972* (*after* Sound Ship made the decision to give up on Staten Island), *he* had discussions with the landlord's agent (*not* Sound Ship), about $240,000 to $250,000 spread over a period of time in un-

equal increments, but these discussions were "strictly between [him] and Klein" (Ja72a), not Sound Ship. From this record, we submit it would have been both reasonable and permissible to argue to a fact finder at a plenary hearing that Bethlehem had never made a bona fide offer to Sound Ship to take the $250,000 in installments over the lease term.

Klein, the landlord's agent, reported to the Sound Ship's principals that *perhaps* the landlord could advance the sum *if*, at the very least, he could exact from Sound Ship:

> (a) a substantial increase in rent (Ja164a);
>
> (b) $100,000 life insurance on the life of each of Sound Ship's principals (Ja164a; Sa245a);
>
> (c) $75,000 cash down payment from Sound Ship (Ja165a); and
>
> (d) personal guarantees from Sound Ship principals (Ja164a) which would have potentially exposed them jointly and severally be a $250,000 personal liability.

Even then, however, the landlord's spokesman warned Sound Ship that the man having the final word might well reject the whole idea (Ja164a to Ja165a).

The "offer" then was far from certain. Moreover, Sound Ship, with good reason, questioned Bethlehem's motives and intent, as well as those of JML (Ja167a, Ja 190a, Ja197a; Sa245a).

Time was running out. Sound Ship's lease had expired, and still it remained at College Point, an unwelcome hold-over tenant. Eventually, an order to show cause was issued, and Sound Ship was evicted (Ja245a).

In desperation, Sound Ship entered into a lease for a waterfront tract in Hoboken, which had formerly been owned by the Pennsylvania Railroad (Ja197a).

This property not only was considerably more costly in terms of rent and operating expenses, but also was far less suited to Sound Ship's business. The delays attendant upon Sound Ship's problems in moving to Hoboken, together with the lack of available launching ways immediately deprived Sound Ship of its new barge construction and existing business and combined to substantially reduce the volume of Sound Ship's repair business. As a result of accumulating expenses and losses of business, Sound Ship finally ceased operations after this action was commenced.

B. *Procedural History*

Jurisdiction of the District Court was based on sections 1 and 2 of the Sherman Act and section 4 of the Clayton Act (15 U.S.C. §§1, 2 and 15 [1970]).

On January 29, 1973, Sound Ship Building Corporation (hereinafter Sound Ship) filed its complaint against Bethlehem Steel Corporation (hereinafter referred to as Bethlehem) and the Bethlehem Steel Company (Incorporated) alleging that these parties had combined and entered into an agreement to restrain trade in the construction and repair of non-self-propelled harbor craft in the New York metropolitan area by removing, through the use of a covenant restricting the use of property, a scarce waterfront facility from those available to actual and potential competitors of respondent. Sound Ship alleged that the acts of the respondent were in violation of sections 1 and 2 of the Sherman Act, that it suffered damages in the sum of $1,080,000, and it prayed that the damages be trebled pursuant to section 4 of the Clayton Act. (Complaint, Ja6a-14a).

Sound Ship later abandoned its section 2 claim, and the action was dismissed as to Bethlehem Steel Company (Incorporated).

Both Sound Ship and Bethlehem moved for summary judgment prior to trial, and the District Court on January 8, 1975, granted Bethlehem's motion and denied Sound Ship's motion, holding that, although the covenant in question would be unreasonable on its face standing alone (App. C, p. A17 it was "ancillary" to an otherwise lawful transaction and therefore was a reasonable, not unreasonable restraint of trade. (App. C, p. A20).

The Court of Appeals for the Third Circuit affirmed the District Court's judgment, sidestepping the issue the District Court concluded was dispositive of the case—whether the restrictive covenant was justified by the ancillary restraints doctrine—but rather concluded that the record on motion for summary judgment did not reflect a triable fact issue with respect to the crucial causal nexus between Bethlehem's offense and the losses sustained by Sound Ship, an issue not briefed or raised in the District Court, not referred to in the District Court's opinion, not discussed in the briefs originally submitted to the Court of Appeals, and not even broached during the course of oral argument before that tribunal. Sound Ship's petition for rehearing, in support of which it was permitted to brief this issue, was denied.

From the affirmance of the decision of the District Court, dismissing plaintiff's complaint, plaintiff-petitioner now seeks a writ of cerioriari.

ARGUMENT

Point I

The court below has decided a significant question of federal antitrust law in direct conflict with the decisions of this court that an antitrust plaintiff need prove only that *some* damage flows from defendant's unlawful acts, and is accorded great liberality in proving the quantum of such damages.

This error was compounded by the corollary holding, for which no authority is cited, that an antitrust plaintiff must further demonstrate that the cost of alternative facilities, to which it is compelled to resort by reason of the defendant's unlawful activities, is itself directly affected by such illegal actions.

The Court of Appeals found it unnecessary to "address the ancillary restraints doctrine, which formed the basis of the district court's opinion" (App. B, p. A8) because plaintiff "failed to develop a theory or to set out any facts . . . which would show a causal link between Bethlehem's acts and Sound's losses," citing *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 114, n.9 89 S. Ct. 1562, 23 L.Ed.2d 129 (1969) and its own decision in *Rea v. Ford Motor Co.*, 497 F.2d 577, 589 (3rd Cir. 1974), *cert. denied*, 419 U.S. 868, 95 S. Ct. 126, 42 L.Ed.2d 106 (1974) for the proposition that, in order to recover, a plaintiff must "prove that the violation (of the antitrust laws) was a material cause of some injury to his business or property."

The factual support for application of this undisputed principle of law was said to be the following:

> "Sound Ship has failed to develop the requisite causal connection in this case. It has neither averred nor in any way suggested that the price for water-front land utilizable as a shipyard generally, or for the Hoboken site in particular, was affected in any manner by Bethlehem's restrictive covenant. There is nothing in the record that indicates that Bethlehem compelled or in any fashion induced Sound Ship to lease the site in Hoboken, and it has not been intimated that Bethlehem affected the rental rate charged for that property. In fact, Sound Ship could have chosen to lease the Mariner's Harbor site from JML, and to pay Bethlehem to release the covenant that restricted the uses allowed on that property, for a combined annual cost approximately one-half as high as the amount it was obligated to pay for the Hoboken property. Based on the record, it can only be concluded that Sound Ship's losses were not caused by action on the part of Bethlehem." [2] (App. B., pp. A8-A9).

Footnoting this summary of the record, the court further noted:

> "If, on the other hand, Sound Ship had leased the Mariner's Harbor property and paid Bethlehem to release the covenant, it conceivably could have shown that the acts by Bethlehem which it claims are illegal had caused it damage. That situation, however, is not before us." (App. B., p. A9, n.7).

The Court of Appeals, in its memorandum opinion, disavowed any implication from the footnote that it was

2. As we discuss hereafter, we strongly dispute the finding of the Court of Appeals, in a summary judgment setting, that "(i)n fact, Ship could have chosen to lease (the Staten Island site), and to pay Bethlehem to release the covenant that restricted the uses allowed on that property, for a combined annual cost approximately one-half as high as the Hoboken rent." (At the very least, this statement assumes that the landlord's cooperation, which was required to assure Bethlehem that the latter would receive its cancellation fee, would be forthcoming—a contingency which was dubious at best) (Sa245a).

of the opinion "that the victim of an allegedly illegal restrictive covenant must pay for the cancellation of such covenant in order to have a cause of action under the anti-trust laws" (App. A, p. A3), but it is simply impossible to otherwise interpret or understand the Court's language. How else, for example, can we read the Court's criticism of Sound Ship's failure to show "that Bethlehem *in any way* induced Sound Ship to lease the site in Hoboken." The Court itself recognized that at first Bethlehem was not willing to consider a release of the covenant under any circumstances (App. B, p. A6), but then manifested a willingness to cancel the covenant for some consideration (whether $250,000 in full in advance or pro rated over the lease term is incidental). Given this new position by Bethlehem, Sound Ship had only three alternatives:

1. Go out of business;

2. Pay the consideration and sue—the footnote 7 suggestion; or

3. Refuse to pay, obtain an alternative site, and then sue if the new site was not as advantageous as the facilities from which it unlawfully was excluded (and rent was but one of the factors involved).

Plaintiff chose the third alternative.

If the Court below meant merely that Sound Ship did not prove that Bethlehem induced it to lease the *Hoboken* site as distinguished from other ship repair facilities, the proposition, of course, is correct, but irrelevant. There was a dearth of appropriate available sites in the New York metropolitan area (Ja165a), and Sound Ship selected Hoboken as a last resort (Sa146a).

A. The proposition that Sound Ship, in order to meet the causal nexus test, first should have paid the tribute

demanded by Bethlehem for release of an illegal covenant, affronts fundamental concepts of fair play and is contrary to analogous precedent.

For example, "when, by his contract, a buyer is entitled to goods on certain terms, he need not accept an offer from the seller to deliver the goods on other terms in full settlement, although the terms are more favorable than can be obtained elsewhere." 11 *Williston on Contracts* (3rd Ed. 1968) §1353, p. 278 citing *Campfield v. Sauer*, 189 F. 576 (6th Cir. 1911). Accord: 5 *Corbin on Contracts* (1964) §1043, p. 272; *McCormick on Damages* (1935), §39, pp. 142-145; 22 *Am. Jur.* 2d, Damages §35, p. 59.

In *Christman v. Maristella Compania Navierra,* 349 F. Supp. 845 (S.D.N.Y. 1971), *aff'd* 468 F.2d 620 (2nd Cir. 1972), a shipowner having reneged on a charter contract, made a post-default offer $10,000 over his original price. The plaintiff-charterer rejected the offer, and rented a substitute vessel for $42,000 above the original contract price. The Court awarded him the full $42,000 in damages, stating that, to prevail:

> "He need not enter into *other risky contracts,* or put himself in a humiliating position, or one involving loss of honor or respect." (Emphasis supplied) (*Id.* at 858).

As pointed out *supra,* risk was rife in Sound Ship's continuing negotiation with Bethlehem, at a time when its prior lease had run, and Bethlehem's offer appeared far from irrevocable.

"Nor need plaintiff *violate a proper standard of business morality* in order to minimize the damages for which the defendant is liable." 11 *Williston, supra,* at 278,

Certainly any payment for the cancellation of an illegal deed restriction must be viewed as such a violation. Nor must a wrongfully discharged employee accept an inferior position from his employer in order to mitigate his damages. Annot: "Nature of Alternative Employment which Employee Must Accept to Minimize Damages for Wrongful Discharge." 44 A.L.R. 3d 629 (1972). 22 *Am Jur* 2d, *supra,* at p. 60. See also Annot: "Employer's Offer to Take Back Employee Wrongfully Discharged, as Affecting Former's Liability." 72 A.L.R. 1049 (1931).

Having rejected (properly we submit) the at best tentative offer of Bethlehem to consider cancelling the offensive restriction, upon payment of $250,000, Sound Ship selected the only possibly appropriate alternative—lease of the Hoboken site with all of its unfavorable features (Sa-246a) at a rental greatly in excess of that which it was considering for Mariner's Harbor.

B. The Court below seems to have agreed that *if* Sound Ship could show that the decision to go to Hoboken entailed *any provable* damage, Sound Ship could recover, but then erroneously confined Sound Ship to allegation and proof that "the price of the Hoboken property or of waterfront land utilizable as a shipyard generally was affected by the restrictive covenant." (App. A, p. A3). The necessity *as a matter of law* of proving a direct link between Bethlehem's wrongdoing and the rent charged in Hoboken was emphasized by this language in the Court's opinion:

> We held merely that an antitrust plaintiff, in a factual situation such as we have here, fails to show the requisite causal link when it has an option of renting property [the Mariner's Harbor site] which has arguably been affected by the acts of the defendant, but instead chooses to lease property [the Hoboken site] that is less suitable to its need and

> costs more, so long as the rental rate for the property actually leased has not been affected by the defendant." (Emphasis added.)[3] (App. A, pp. A3-A4).

We submit that the Court below has confused proof of the *fact* of loss with *quantum* of loss, and in so doing has ignored the teachings of this court in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 66 S. Ct. 574, 90 L.Ed. 652 (1946); *Zenith Radio Corp. v. Hazeltine Research Co.*, 395 U.S. 100, 89 S. Ct. 1562, 23 L.Ed.2d 129 (1969); and *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 82 S. Ct. 1404, 8 L.Ed.2d 777. *Bigelow* affirmed the proposition that an antitrust plaintiff is entitled to a preliminary trial if he can demonstrate *some* causal nexus between his losses and a defendant's violation of the antitrust laws, and if any reasonable inference of such causation is permissible, the matter becomes one for jury determination. Once some resulting injury in fact has been established, less rigid standards of proof with respect to the quantum of damages are tolerated because a wrongdoer should bear the risk of uncertainty which inheres in the harm which he has caused. *Bigelow, supra* at 265-266.

This is not the *Rea* situation, *supra*, on which the court below relied, where the plaintiff not only made no

3. Attached to Sound Ship's petition for hearing was an affidavit by a real estate broker (Sa242a-Sa243a) attesting to the almost obvious fact that removal from the market, by reason of Bethlehems' enforcement of the restrictive covenant, of one of a relatively few available sites for marine repairs increased the prices that landlords of other available sites could charge. This affidavit was not part of the record before the trial court for the reason that the causal nexus-damage issue was not advanced as the basis for summary judgment by Bethlehem's moving papers, and was rejected by the District Court. The Court of Appeals footnote again emphasized the primary rationale for concluding that Sound Ship failed to prove the requisite causal nexus because the record below "in no way indicate[s] that the owner of the Hoboken site even knew of the restrictive covenant covering the Mariner's Harbor site when it leased the property to Sound Ship." (App. A, p. A4 in support of its declining to consider the affidavit).

claim to damages caused by defendant's activities, but expressly disavowed any such contention, relying on an expert's theory that it was entitled to a subsidy from the wrongdoer, over and above its own admitted profits.

It is true that Sound Ship does not claim that the Hoboken rent was affected by Bethlehem's activities, except to the extent that arbitrary removal of one of a relatively scarce number of suitable ship repair sites in the metropolitan New York area from the market inevitably must affect the rent obtainable by the owners of the remaining sites. But this is irrelevant to the *fact* of damages. An innocent party need prove no more than a breach by the defendant of some obligation which compelled the plaintiff to resort to more costly alternatives. The plaintiff need not prove, additionally, that the *quantum* of the extra cost was itself affected by the defendant. Thus, a seller who unlawfully breaches a contractual commitment to deliver specified goods at a specified price is liable in damages for the difference between the contract amount and the amount subsequently paid by the innocent buyer, as well as incidental or consequential damages). (*E.g., N.J.S.A.* 12A:2-7.2, Uniform Commercial Code. According to the New Jersey Study Comment on that Section of Article 2 of the Uniform Commercial Code, "If the covering buyer acts reasonably and in good faith, he can recover the difference between the cost of cover and the contract price in spite of proof that his method of cover was not the cheapest or most effective that could have been used." See also, Hawkland, *Sales & Bulk Sales under the Uniform Commercial Code,* 135 (1958). The buyer does not have to prove that the new price was in some way affected by the wrongdoer, as the Court of Appeals seems to suggest. The disappointed ship charterer in *Christman, supra,* was not compelled to demonstrate that the defaulting defendant had

directly affected the price the charterer had to pay in order to charter a substitute vessel.

A buyer may recover for losses incurred through purchases from non-conspiring sellers against members of a conspiracy to fix prices. He does not even need to show a commercial relationship with the wrongdoer, in order to meet the causation test, and he certainly is not required to show a direct effect by the conspirators on prices charged by other sellers. *State of Washington v. American Pipe & Construction Co.*, 280 F. Supp. 802 (W.D. Wash., 1968), *aff'd sub nom. American Pipe & Construction Co. v. Pence*, 393 F.2d 568 (9th Cir. 1968) *cert. denied* 393 U.S. 817 (1968).

The very *demand* for $250,000 as consideration for cancellation of the covenant caused immediate and dramatic damage to Sound Ship's economic position from the moment it was made (even assuming, again ***arguendo***, as the Court of Appeals insists, that the offer was unequivocal and *un*accompanied by the other conditions set forth in the Background Facts, *supra*, at p. 8).

The moment this additional cost was projected into the economic equation, Sound Ship's business was adversely affected. It was by this amount that the base rent for the Staten Island premises was unlawfully inflated—thus setting the base rental floor against which Sound Ship had to evaluate other available sites. Put another way, if it opted not to pay the ransom, however minimal it was, in confronting other prospective landlords, Sound Ship could consider and equate for comparative rental purposes only the rent demanded by the Staten Island landlord *plus* the additional $250,000 cancellation fee. In the practical, pragmatic sense, Sound Ship was damaged at least to the extent of this $250,000, which one

way or the other—either to Bethlehem or another landlord, it was compelled to pay and did pay as a cost of doing business. The full extent of Sound Ship's injury would involve a measurement of damages issue for the jury, but there can be no doubt that Sound Ship was injured at *the very least* by that $250,000 amount.

Concentration by the Court below on the Hoboken rent issue alone also ignored the fact that Bethlehem looked to JML, JML looked to Sound, and JML wanted much more than the $250,000—life insurance policies, personal guarantees, and the like (Ja164a, 165; Sa245a). Moreover, Sound suffered damage when it came to Hoboken not only because of the higher rent, but also because of the very unfavorable physical conditions of that shipyard compared with Staten Island (Ja174a).

It simply defies logic and fundamental fairness, under the circumstances, to require Sound Ship to prove that Bethlehem contrived to produce directly the factors (including rent) which made Hoboken undesirable and caused Sound Ship's damages. It was enough that Bethlehem wanted a substantial sum of money to surrender an illegal restriction, and consequently was the proximate cause of Sound Ship going elsewhere. Application of the rule of damages enunciated below would thwart the holdings of *Bigelow* and *Zenith* by enabling the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case involving a restrictive covenant as to preclude any recovery, by rendering the "measure of damages uncertain . . . it would mean that the more grievous the wrong the less likelihood there would be of a recovery." *Bigelow, supra*, at 264-265.

Point II

This case questions the validity, under federal antitrust laws, of a restrictive covenant limiting or prohibiting future conduct of a purchaser in an area affected with the public interest, and the viability of the "ancillary restraints" doctrine articulated by *United States v. Addyston Pipe & Steel Co.*, in the light of recent decisions of this court condemning a broad spectrum of similarly anti-competitive restrictions.

The District Court, in summarily concluding that the restrictive covenant at issue was a reasonable restraint of trade legitimately ancillary to Bethlehem's sale of the Staten Island property, relied principally upon *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th 1898), *aff'd*, 175 U.S. 211 (1889).

Addyston presented what now is regarded routinely as a classic *per se* antitrust situation—an agreement among competitors to share markets and fix prices. Perhaps because this was one of the first cases in which the newly enacted Sherman Act was being invoked, perhaps by way of apology and reassurance to the business world, Judge Taft in dictum stepped far beyond the confines of the case to develop standards for activity which *might* be permissible, and in so doing, he discoursed at length with respect to examples of "reasonable" restraints of trade, upheld under common law:

> "For the reasons given, then, covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1, 2, and 3) to the enjoyment by the buyer of the property, good will, or interest in the partnership bought; or (4) to the legitimate ends of the existing partnership; or (5) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or (6) to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employe of the confidential knowledge acquired in such business."
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> "[N]o conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." (85 F. 281-82)

Although Judge Taft spoke pedagogically in terms of historical affirmance of covenants "by the buyer of property not to use the same in competition with the seller," (*Id.* at 281) he could cite but five such cases[4] none involving a covenant of the type questioned here. Moreover, although this Court, in modifying and then affirming the Court of Appeals' decree, specifically cited at length and with approval extensive portions of Judge

4. *American Strawboard Co. v. Haldeman Paper Co.*, 83 F. 619 and *Hitchcock v. Anthony*, 83 F. 779, both decisions of the *Addyston* Court; *Navigation Co. v. Winsor*, 20 Wall. 64; *Dunlop v. Gregory*, 10 N.Y. 241; and *Hodge v. Sloan*, 107 N.Y. 244, 17 N.E. 335.

Taft's opinion, it did *not* discuss the latter's sweeping analysis of the common law "ancillary restraint" rule, which has never received approval by this Court, or, with very rare exceptions, any court in a federal antitrust setting.[5]

Traditionally, the validity of restrictive covenants "ancillary" to the purchase or sale of a business, the conveyance of land, or as part of an employment agreement has been evaluated in the context of what reasonably is related to the legitimate interests of the covenantee, imposes no undue hardship upon the covenantor and does not injure the public. In all jurisdictions the *prima facie* validity of such covenants almost always is determined upon an application by the covenantee to a state chancery court for a preliminary injunction, at the outset of the action, adjudicated on moving papers, affidavits and depositions and results in a threshold decision which usually is dispositive of the case for all practical purposes. Almost every reported decision and commentator treats the problem in classical chancery concepts with little or no reference to federal antitrust principles. Research has unearthed virtually no decision testing the validity of such restraints against evolving concepts of federal antitrust law. Yet, as one of the most authoritative articles in the field, *Blake, Employee Agreements Not to Compete,* 73 Harv. L. Rev. 625, 628 (1960), observed with respect to employee covenants not to compete, that "paradoxically the Sherman Act is apparently never called into play against this traditional type of contract in restraint of trade," noting in a footnote:

> "When the required effect on commerce is present, unreasonable postemployment restraints would seem clearly to violate the Sherman Act, with the usual consequences, including possible action by the attorney general and treble-damage liability to the injured party. The legislative history and subsequent judicial discussion of the Sherman Act seem clearly to indicate that its purpose was certainly not less than to make illegal those restraints which had been unenforceable at common law. See ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 5-12 (1955). However, the Antitrust Division has in all likelihood never turned its attention to such agreements, and no treble-damage actions have been discovered among the reported thousands of cases. Virtually all were suits brought by employers seeking injunctive relief or damages, or both. Occasionally a declaratory judgment is sought by a covenantor but in only one case that has been found was there combined a claim of damages to the employee resulting from his unemployability; there is no indication that treble damages were sought. The matter apparently never came to trial. *Herskovitz v. Todd Co.*, 85 N.Y.S. 2d 707 (Sup. Ct. 1949)." *Id.* at n.8.

5. In this sense, the customary reference to *Addyston* and its "progeny" (cf. Sa235a) is almost a malapropism because the "progeny" consists of state court decisions dealing with the state common law validity of such covenants.

Virtually the same explanation is offered by Goldschmid, *Antitrust's Neglected Stepchild: A Proposal For Dealing With Restrictive Covenants Under Federal Law,* 73 Col. L. Rev. 1193, 1206 (1973), who also agrees that "federal laws, with rare and tangential exceptions, have not been applied to restrictive covenants," a phenomenon the author regards as seriously compromising national antitrust goals. *Id.* at 1193-5.

We submit that the time has come for this Court to confront squarely the issue of the validity of restrictive covenants under Sherman Act concepts, particularly in a factual setting such as this involving a 20 year prohibition against the competitive use of ship repair facilities in a limited geographical and commercial market, tacked onto

a simple deed conveying title to property which the grantor found uneconomical to retain.

A. *Covenants restricting the use of property for the sole purpose of preventing competition with the seller of the property are per se illegal*

It may be true that restrictive covenants extracted by sellers of property do not fit neatly and precisely into any of the categories of agreements which have been found by this Court to be *per se* illegal, but a deed restriction which limits the freedom of a grantee of land, once the grantor has parted with title thereto, is no more justifiable or valid than territorial and customer restrictions imposed by sellers of goods, which have been ruled inherently anti-competitive because they have no tendency whatever to aid an underlying transaction or otherwise promote or benefit trade or commerce. See, e.g., *United States v. Arnold Schwinn Co.*, 388 U.S. 365, 87 S. Ct. 1856, 18 L.Ed. 2d 1249 (1967); *United States v. Sealy*, 388 U.S. 350, 87 S. Ct. 1847, 18 L.Ed. 2d 1238 (1967); *United States v. Topco Associates*, 405 U.S. 596, 92 S. Ct. 1126, 31 L.Ed. 2d 515 (1972).

Admittedly, other more traditional covenants in the categories discussed by Judge Taft in *Addyston, supra*, at 281-82, are facially reasonable or at least can be reasonable under circumstances ultimately found by the fact finder to be determinative; for example, a covenant *given* by a seller of a business involving a substantial amount of personal goodwill or employee covenants not to compete, given at the time employment commences, where there are trade secrets, confidential information or customer relationships to protect.

No justification exists, however, to test a *buyer's* covenant by a "rule of reason," certainly not in a factual setting such as this case.

The buyer's covenant extracted by Bethlehem was for no other than anti-competitive purposes. There was no goodwill, confidential information or trade secret at stake to be protected. There was only Bethlehem's desire to obtain for itself a kind of protection against competition admittedly not legally obtainable except for the fact that it had sold the property—because, standing alone as a covenant given by a third party land owner, the restraint would be a naked anti-competitive device, as the District Court so concluded. The covenant at issue here was not by any stretch of the imagination *in aid of* the sale of the property it restricted, or necessary for the sale. The only impact on the sale or saleablity of that property was a negative one. Although Bethlehem below *argued* that it *could* have chosen to keep the property if it had not been able to impose the restriction, and claims "credit" for injecting this and two other sites into the commercial stream, nowhere in the record is there any fact to support the assertion that it *would* have kept the property if it had not been able to impose the restriction. Indeed, the facts suggest otherwise. Bethlehem was saddled with three uneconomical, unproductive, costly capital investments. It is pure fantasy to suppose that, absent the restriction, the yards would have been retained, and we doubt that shareholders, directors or other customary management controls would have tolerated their continued retention.

Unless *United States v. Arnold Schwinn Co.*, 388 U.S. 365, 87 S. Ct. 1856, 18 L.Ed. 2d 1249 (1967), which outlawed as per se illegal, restrictions imposed by a bicycle manufacturer on the resale of bicycles distributed by it, is to be confined to bicycles, we see no difference between the *Schwinn* restrictions which arguably were "ancillary" to the manufacturer's underlying sale and distribution scheme, and the restrictions Bethlehem as seller here would impose on land once it has parted with title thereto.

There is simply no justification for permitting a seller of property to restrict its subsequent use in order to protect itself from competition. Bethlehem could not have sold the yard and thereafter purchased a covenant not to compete. What reason is there, then, in logic, public policy or freedom of contract to permit Bethlehem to use the excuse that the same anti-competitive covenant is "ancillary" to delivery of a deed? We submit there is none.

B. *The covenant at issue here is an unreasonable restraint of trade even if it is to be evaluated under the doctrine of ancillary restraints*

Both Bethlehem and the District Court cited, *inter alia, United States v. Columbia Pictures Corp.*, 189 F. Supp. 153 (S.D.N.Y. 1960) as support for the proposition that two tests for evaluating a restrictive covenant are:

1. Whether the restraint is ancillary to the main purpose of a lawful contract.

2. Whether the restraint is no greater than necessary to afford fair protection to the parties and not so extensive as to interfere with the interests of the public.

With respect to the first test, restrictive covenants must be reasonably necessary to the *primary* purpose of the underlying transaction to which they are annexed, in order to be "ancillary" thereto. *U.S. v. Columbia Pictures Corp., supra.* Even Judge Taft so conceded—*Addyston, supra,* at 280.

We have demonstrated that Bethlehem's sole purpose in extracting the restrictive covenant from the buyer of its Staten Island yard was to prevent the use of that yard in competition with its Hoboken yard—the same purpose for which it imposed restrictive covenants in the deeds to the other three yards it sold in the New York harbor area. Its "legitimate primary purpose" in disposing of those yards,

including its Staten Island yard, was to rid itself of the cost of maintaining an inventory of yard facilities which it no longer needed for the conduct of its business, and to obtain the best price it could for those yards. It was not *replacing* the Staten Island yard with another yard, in which case Bethlehem could conceivably argue that the restriction was in furtherance of the overall transaction of replacing one yard with another. Nor does the record support the contention that Bethlehem would not have sold the Staten Island yard if it could not have imposed the covenant at issue here.

With respect to the second test, Bethlehem did not show or allege facts to support the conclusion that the covenant in issue here is no greater than necessary to afford fair protection to the parties and not so extensive as to interfere with the interests of the public.

That part of the covenant to which Sound Ship objected—the restriction against the use of the property for the construction and repair of "non-self-propelled harbor craft, including non-self-propelled barges for petroleum products" (Ja230a to Ja231a) was *not* reasonably necessary to protect Bethlehem's Hoboken yard from competition. Two Bethlehem officers so admitted (Ja264a). Thus the proofs, summarily evaluated, show a total lack of support for the second criterion of reasonableness, by which "ancillary" restraints are evaluated under *Addyston*

Point III

The District Court holding that the restrictive covenant *was in fact* a reasonable restraint of trade, adopts a "per se" test of reasonableness, in violation of this court's admonition that summary procedures should be used "sparingly" in antitrust cases.

The irony of the District Court's summary holding that Bethlehem's covenant was patently *reasonable* is under-

scored by the amazement of at least one Bethlehem executive, privately expressed, at the thought that the corporation "could legally enforce such a restriction" limiting the new owner's prerogative to lease. (Ex. P-6; Ja237a).

In the complex context of antitrust litigation, a motion for summary judgment prior to trial should be granted with extreme caution by the courts. Whether a defendant's activities are being tested by the "rule of reason" or the "*per se* unreasonable" standard, power, motive, intent and effect are all vitally important factual issues which are not susceptible of resolution—except where anti-competitive motive, intent and effect are demonstrable on documentary evidence. So held this Court in *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 472-73, 82 S. Ct. 486, 7 L.Ed.2d 458, an action brought under sections 1 and 2 of the Sherman Act:

> It may be that upon all of the evidence a jury would be with the respondents. But we cannot say on this record that 'it is quite clear what the truth is'. Certainly there is no conclusive evidence supporting the respondents' theory. We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We *believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.* It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed judgment." (Emphasis added).

In this case, in support of its conclusions that the covenant was reasonable, the District Court made several

critical findings of fact for which there is either little support in the record or conflicting evidence which a finder of fact could resolve against Bethlehem.

1. Viable alternative sites were available to Sound Ship in the relevant market (App. C, pp. A17-A18).

There is no evidence in the record to demonstrate that a single viable alternative site was available to Sound Ship. Officers of Sound Ship were shown several alternative sites (Ja178a to Ja179a), but an extensive search lasting for 3 years turned up not a single viable alternative site (Ja130a). Bethlehem has argued that the principal deterrent to plaintiffs locating another site was its financial condition. While it is true that this was indeed a *major factor*, as plaintiff's officers conceded in their depositions (Ja143a), nevertheless all sites other than the Mariner's Harbor location were *effectively functionally unavailable to Sound Ship* (Ja138a, Ja179a). Bethlehem, itself, searched unsuccessfully for another location (Sa247a). Indeed, the Hoboken yard was Sound Ship's only alternative to going out of business, and even that site was not "viable," as subsequent events have demonstrated.

2. Bethlehem did not exercise monopoly powers in connection with the covenant in question. (App. C, p. A18).

There is nothing in the record below which shows, one way or the other, whether Bethlehem enjoyed monopoly power in the relevant market, or whether it was exercising that power in connection with the enforcement of its restrictive covenant.

Sound Ship's officers have conceded that Bethlehem shares the overall barge and ship repair and construction market with others (Ja125a) (but does not acknowledge the absence of monopoly power). One of the indicia of monopoly power is the power to exclude competitors from

a market. Surely Bethlehem's actions had the effect of excluding Sound Ship from a highly desirable site, in a market having a limited number of sites available at *any* cost. There can be no doubt but that Sound Ship, forced to attempt operation at inferior facilities, has ceased doing business and has been "excluded" from the relevant market, whatever it is.

Short of simply guessing, there is no basis for concluding on this record that Sound Ship could not under *any* circumstances demonstrate at trial that Bethlehem exercised monopoly power in the creation and continued enforcement of its restrictive covenant.

3. The covenant is not an expression by Bethlehem of an intent to eliminate Sound Ship as a competitor. (App. C, pp. A18-A19).

Bethlehem's motives in creating and enforcing the covenant were clearly to prevent or eliminate competition.

Both Bethlehem and the District Court would separate the creation of the covenant from its enforcement, and therefore insulate its creation from the clear evidence of Bethlehem's anti-competitive motives at the time of its enforcement. We do not contend that Bethlehem intended in 1964 to eliminate *Sound Ship* as a specifically designated target from the relevant market—it may well be, as officers of Bethlehem testified on depositions, that Bethlehem was unaware of Sound Ship's existence at the time (Ja28a). But the covenant—the purchaser's agreement with Bethlehem not to permit Bethlehem's former yard to be used in competition with it—was obviously intended to prevent *someone* from competing with it.

As was pointed out *supra*, Bethlehem's executives in memoranda to one another, concede the point (Ja237a, Ja240a, Ja241a, Ja242a, Ja243a, Ja245a, Ja247a).

From whatever perspective one chooses to view the events of 1964 and 1971, it is clear that they are related to each other. It is a well-established maxim that one of the best indicators of the intent or purpose of any agreement is the conduct of the parties pursuant to it. *Philips Electronics & Pharmaceutical Industries Corp. v. Leavens*, 421 F.2d 39 (3d Cir. 1970); *American Cyanamid Co. v. Ellis-Foster Co.*, 298 F.2d 244 (3rd Cir. 1962); 3 *Corbin on Contracts* §558 (1960). In this case, it makes eminent sense to look to the 1971 conduct of Bethlehem in order to determine that the purpose of Bethlehem in creating the covenant in 1964 was to stifle competition.

4. The terms of the covenant in question are not greater than reasonably necessary to afford protection to Bethlehem's legitimate interest. (App. C, p. A19).

This proposition merely represents the trial court's conclusions as to an ultimate issue—a determination which at the very least should have been left for the fact finder after plenary hearing. *Cf. Poller, supra.*

5. The covenant does not interfere with the public interest. (App. C, p. A19).

Again there is nothing in the record to support this conclusion. Neither side dealt with the issue in discovery. We do know that Bethlehem internally expressed concern about the use of its former yard by Sound Ship because of the possibility of its "under-bidding our own facilities on pierside work due to drastically lower overhead costs and plant investments" (Ja237a). Whether Sound Ship would in fact have had such an effect on prices in the relevant market, we do not know from the present record; such proof may be difficult to marshal, but it is submitted that Bethlehem, having decided to enforce its covenant against a competitor whose under-bidding it

feared, should not be permitted to avoid a full trial on the issue of public injury because the consequences of its enforcement were to make such proof difficult as a result of the elimination of the potential under-bidder from the market.

It is submitted that, under the above or any other formulation of the rule concerning the role of factual issues in ruling on motions for summary judgment, there remain overhead costs and plant investments" (Ja237a). Whether unresolved factual disputes critical to the District Court's interpretation of the law which, when construed most favorably for Sound Ship, do not reasonably permit granting Bethlehem's motion for summary judgment. The judgment below should therefore be reversed.

CONCLUSION

For the reasons set forth above, the Writ should be granted, and, for the reasons outlined in Points I-III above, the decision below should be reversed.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/
ALBERT G. BESSER

/s/ Charles H. Cottingham
CHARLES H. COTTINGHAM

/s/ Susan Littman
SUSAN LITTMAN

APPENDICES "A" and "B"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 75-1337

SOUND SHIIP BUILDING CORP.,
a New York corporation,

Appellant,

v.

BETHLEHEM STEEL COMPANY
(INCORPPORATED), a Pennsylvania corporation and
BETHLEHEM STEEL CORPORATION,
a Delaware corporation

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

D.C. CIVIL No. 112-73

APPENDIX "A"

MEMORANDUM SUR PETITION FOR REHEARING BEFORE THE PANEL
(Filed April 23, 1976)
(As Amended)

PER CURIAM:

After the filing of the opinion in this matter, a petition for rehearing before the panel was presented. In it, Sound Ship took issue with several of the factual assumptions underlying the opinion, emphasizing that the appeal was from a summary judgment entered by the district court, and that the presence of material factual issues mandated reversal. It further stated in its petition that the point that we deemed dispositive of the appeal—Sound

Ship's failure to set out any facts showing a causal nexus between Bethlehem's acts and Sound's losses—had not been adequately briefed. The reasons asserted for the inadequacy were that the issue of causation had neither been raised in the district court nor urged in this Court by Bethlehem as a ground for affirmance.

We granted permission to Sound Ship to file a brief in support of its petition for rehearing and to Bethlehem to file a brief in opposition. The parties were specifically requested to address the question whether there is anything in the record sufficient to show a causal relationship between the restrictive covenant imposed by Bethlehem and the losses allegedly suffered by Sound Ship.[1]

Sound Ship maintains that we neglected in our opinion to account for a critical portion of the record. That portion of the record, it is claimed, presents evidence that Bethlehem offered to remove the covenant from the Mariner's Harbor property only if Sound Ship would pay the full $250,000 waiver fee immediately. The requirement that the full fee be paid "up front"—rather than over the remaining thirteen years of the life of the covenant, as we described it in our opinion—is alleged to provide the causal link that we found lacking between Bethlehem's acts and Sound's losses. It does so, the argument continues, because it makes incorrect our understanding that the record fails to demonstrate that the damages flowing from the choice of land ultimately made by Sound

1. We also stated in our order that the parties could present any further analysis of the ancillary restraints doctrine, the basis of the district court's decision, which they wished to bring to the attention of the Court.

Subsequent to the filing of Bethlehem's brief, Sound Ship submitted a reply memorandum, which we have also considered.

Ship were caused by Bethlehem. Since Sound Ship could not afford to pay $250,000 immediately, the argument goes, it had no choice but to rent the Hoboken site. Thus, Sound Ship contends, it losses were attributable to Bethlehem's refusal to release the Mariner's Harbor covenant for a reasonable price and on reasonable terms.

We have reread the record carefully, but do not find it to support the assertions made by Sound Ship in its petition for rehearing. The record nowhere contradicts the statement made in our opinion that Bethlehem offered "to lift all restrictions [on the Mariner's Harbor property] for a price of $250,000, to be paid over the remaining thirteen years that the covenant would otherwise have been effective."[2] Nor do we find any factual material set forth in the depositions or other documents in the record indicating that the price of the Hoboken property or of waterfront land utilizable as a shipyard generally was affected by the restrictive covenant, or that Bethlehem in any way induced Sound Ship to lease the site in Hoboken. Rather, our review reveals the same factual pattern we noted originally, and it leads us to the same result: Sound Ship did not articulate in the depositions and other documents any causal nexus between Bethlehem's acts and Sound's losses.

Sound Ship has also suggested that we were incorrect in concluding in our opinion that the victim of a restrictive covenant must pay for the cancellation of such covenant in order to have a cause of action under the antitrust laws. That rule was neither embraced nor implied in our opinion. We held merely that an antitrust plain-

2. Slip op. at 3. The brief filed by Sound Ship in support of its petition for rehearing contains several statements that are not supported by those portions of the record to which reference is made. Some of these references relate to factual matters that are critical to the outcome of the question the parties were asked to brief.

tiff, in a factual situation such as we have here, fails to show the requisite causal link when it has an option of renting property (the Mariner's Harbor site) whose price has arguably been affected by the acts of the defendant, but instead chooses to lease property (the Hoboken site) that is less suitable to its needs and costs more, so long as the rental rate for the property actually leased has not been affected by the defendant.[3]

The petition for rehearing before the panel will be denied.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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3. Sound Ship attached to its petition for rehearing an affidavit by a real estate broker expressing his opinion that the effective removal of the Mariner's Harbor site from the market, which allegedly resulted from the enforcement of the covenant by Bethlehem, increased the prices that landlords of available sites could charge. In its brief, Sound implied that the affidavit creates a material factual issue, precluding summary judgment. Because of the untimeliness of its filing, and the fact that permission for such filing was neither sought nor granted the affidavit may not be considered. The presence or absence of genuine issues of material fact is to be gauged as of the time judgment was entered by the district court. City Electric, Inc. v. Electrical Workers Local 77, 517 F.2d 616, 617 (9th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3229 (U.S. Oct. 14, 1975); Garcia v. American Marine Corp., 432 F.2d 6, 8 (5th Cir. 1970); Thompson v. Evening Star Newspaper Co., 394 F.2d 74, 777 (D.C. Cir.), *cert. denied*, 393 U.S. 884 (1968); Clarke v. Montgomery Ward & Co., 298 F.2d 346, 349 (4th Cir. 1962); 10 C. Wright & A. Miller, Federal Practice and Procedure §2716, at 435-36 (1973). *Cf.* Street v. Surdyka, 492 F.2d 368, 374 (4th Cir. 1974); Applegate v. Top Associates, Inc., 425 F.2d 92, 94-95 (2d Cir. 1970). In any event, the extensive depositions taken in this case in no way indicate that the owner of the Hoboken site even knew of the restrictive covenant covering the Mariner's Harbor site when it leased the property to Sound Ship.

APPENDIX "B"

OPINION OF THE COURT
(Filed January 16, 1976)

ADAMS, Circuit Judge.

This is an appeal by Sound Ship Building Corporation (Sound Ship) from the district court's ruling that Bethlehem Steel Corporation (Bethlehem) did not violate section 1 of the Sherman Act by including a restrictive covenant in the deed of sale transferring certain land to the JML Trading Company (JML). We affirm the judgment, although on a ground different from that relied on by the district court.

I.

Sound Ship is a corporation that engaged in the construction and repair of non-self-propelled barges in the New York harbor area. During the 1950's and 1960's, it conducted its business at a site in the College Point section of Queens, New York. The land and facilities were used by Sound Ship under the terms of a lease that expired in September 1971.

When it was informed by its landlord that the lease would not be renewed, Sound Ship sought a new location for its operations. In the course of its search, Sound Ship examined over forty parcels of land in the New York region. The one that it found most suitable was part of a tract known as Mariner's Harbor Industrial Park, on Staten Island. This site had sufficient pier space, water depth, and launching ways for Sound Ship's construction business.

The Mariner's Harbor property was owned by JML. It had previously been one of four shipyards operated by Bethlehem in the New York area. Bethlehem had sold

it and two of the other three shipyards during the 1960's in the face of a decline in the region's ship-building market. In each of the three sales, Bethlehem had included a deed restriction that prohibited the use of the location for the construction or repair of ships for a specified period of time. The sale of the Mariner's Harbor property to JML took place in 1964, and the restriction in the deed of sale was to be effective for twenty years.

JML was willing to rent its Mariner's Harbor site to Sound Ship, but the covenant restricting the business permitted there rendered the property of limited value for Sound Ship's purposes. Because it found the site so attractive, Sound Ship attempted to obtain a release of the covenant from Bethlehem. At first, Bethlehem refused to grant the release, but it later expressed a willingness to lift all restrictions for a price of $250,000, to be paid over the remaining thirteen years that the covenant would otherwise have been effective. When this figure was combined with the rental fees that JML would have charged, Sound Ship would have had to pay just over $45,000 annually for the property. Sound Ship decided not to take the property, and the only reason set forth for its declination is that one of Sound's principals became angry at the prospect of paying $250,000 to a competitor.

Subsequent to January 1972, Sound Ship leased a property in Hoboken, New Jersey. The Hoboken site, however, presented Sound Ship with several difficulties. In particular, it did not have sufficient launching ways for construction of new vessels; the water was too shallow for use of Sound Ship's floating drydock; and heavy tugboat traffic and a severe tidal rip made the performance of repair work in the water rather difficult. Despite these problems, the annual rental that Sound Ship agreed to pay for the Hoboken location was $56,000—almost $11,000 more than

Sound Ship would have had to pay for the Mariner's Harbor property. An additional $33,250 had to be expended every year at Hoboken for watchman and security services, which would have been provided free of charge by the landlord at Mariner's Harbor, and for dredging, which would not have been necessary at Mariner's Harbor. As Sound Ship concisely states in its brief, the Hoboken property "not only was considerably more costly in terms of rent and other operating expenses, but also was far less suited to Sound Ship's business."

Some time after leasing the Hoboken property, Sound Ship's financial condition deteriorated, and the company ultimately went out of business. Sound Ship filed suit against Bethlehem, in January 1973. It alleged in its complaint that the inclusion of the restrictive covenant in the deed of sale and Bethlehem's refusal to waive the restrictions without payment of a fee violated sections 1 and 2 of the Sherman Act.[1] The Count of the complaint based upon section 2 was later voluntarily dropped by Sound Ship.

Each party moved for summary judgment. Based on the pleadings, affidavits, answers to interrogatories, and depositions, the district court entered judgment in favor of Bethlehem. The trial judge held that the covenant was merely ancillary to a lawful primary contract, and was therefore not violative of section 1 of the Sherman Act. Principal reliance was placed by the district court upon *United States v. Addyston Pipe & Steel Co.*[2] and its progeny.

1. 15 U.S.C. §§1, 2 (1970). Section 1 provides in part: "Every contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, . . . is declared to be illegal. . . ." Section 2 provides in part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, . . . shall be deemed guilty of a misdeamenor. . . ."

2. 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

II.

Because Sound Ship has failed to develop a theory or to set out any facts in the depositions and other documents that have been filed which would show a causal link between Bethlehem's acts and Sound's losses, the judgment of the district court must be affirmed. This disposition of the case makes it unnecessary to address the ancillary restraints doctrine, which formed the basis of the district court's opinion.

The requirement that an antitrust plaintiff demonstrate that the alleged illegal acts were the cause of its damages is well established. Section 4 of the Clayton Act, the statute vesting jurisdiction over antitrust suits in the federal courts, allows recovery only to a plaintiff who is injured "by reason of" a violation of the antitrust laws.[3] As early as 1913, the Supreme Court recognized the necessity of a plaintiff's establishing a causal connection between the defendant's acts and the plaintiff's injury,[4] and that rule has been reaffirmed through the years.[5]

Even if a defendant's acts are shown to be violative of the statute, therefore, a plaintiff may not recover unless a nexus to its own injury is also demonstrated. This Court has only recently ruled that in order to recover, a plaintiff "must prove that the violation [of the antitrust laws] was a material cause of some injury to his business or property.[6]

Sound Ship has failed to develop the requisite causal connection in this case. It has neither averred nor in any way suggested that the price for waterfront land utilizable

3. 15 U.S.C. §15 (1970).

4. Virtue v. Creamery Package Mfg. Co., 227 U.S. 8, 24-25 (1913).

5. *See, e.g.*, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n. 9 (1969).

6. Rea v. Ford Motor Co., 497 F.2d 577, 589 (9rd Cir.), *cert. denied*, 419 U.S. 868 (1974). *Accord*, Pitchford v. PEPI, Inc., 75-1136, 75-1137 (3d Cir., Dec. 24, 1975).

as a shipyard generally, or for the Hoboken site in particular, was affected in any manner by Bethlehem's restrictive covenant. There is nothing in the record that indicates that Bethlehem compelled or in any fashion induced Sound Ship to lease the site in Hoboken, and it has not been intimated that Bethlehem affected the rental rate charged for that property. In fact, Sound Ship could have chosen to lease the Mariner's Harbor site from JML, and to pay Bethlehem to release the covenant that restricted the uses allowed on that property, for a combined annual cost approximately one-half as high as the amount it was obligated to pay for the Hoboken property. Based on the record, it can only be concluded that Sound Ship's losses were not caused by action on the part of Bethlehem.[7]

III.

Sound Ship alleged in its complaint that Bethlehem's acts had directly caused Sound Ship's damages. Under the rule that once prevailed in this court, that allegation alone may have been sufficient to put the factual issue in dispute and thereby to preclude summary judgment.[8]

However, Rule 56(e) of the Federal Rules of Civil Procedure was changed in 1963 to read that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his

7. If, on the other hand, Sound Ship had leased the Mariner's Harbor property and paid Bethlehem to release the covenant, it conceivably could have shown that the acts by Bethlehem which it claims are illegal had caused it damage. That situation, however, is not before us.

8. *See, e.g.*, United States v. Various Articles of Drugs, 314 F.2d 850, 852 (3d Cir. 1963); Lawlor v. National Screen Service Corp., 238 F.2d 59, 65 (3d Cir. 1956), *vacated per curiam on other grounds*, 352 U.S. 992 (1957); F.A.R. Liquidating Corp. v. Brownell, 209 F.2d 375, 379 (3d Cir. 1954); Frederick Hart & Co. v. Recordgraph Corp., 169 F.2d 580, 581 (3d Cir. 1948).

response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." The Advisory Committee on Civil Rules recommended changing Rule 56(e) in response to this Court's interpretation, which had made pleadings alone sufficient to counter a well-supported motion for summary judgment. The Committee stated that the modification was made "to overcome a line of cases, chiefly in the Third Circuit, which had impaired the utility of the summary judgment device. . . . [When the party opposing the motion] rests on averments of his pleadings which on their face present an issue . . . Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are 'well-pleaded' and not suppositious, conclusory, or ultimate."[9]

Following the guidance provided by the amended language, the Supreme Court has held that Rule 56(e) makes clear "that a party cannot rest on the allegations contained in his complaint in opposition to a properly supported summary judgment motion made against him."[10]

Sound Ship argues that five findings of fact made by the district court are disputed, and that those findings are thus inappropriate in the summary judgment context presented here. However, all five factual issues concern the doctrine of ancillary restraints. Because our disposition of the case makes it unnecessary to discuss the applicability of that doctrine, *see* note 3, *supra*, the five

9. Judicial Conference of the United States, Report of Proposed Amendments to Certain Rules of Civil Procedure for the United States District Courts, 31 F.R.D. 621, 648 (1962). *See also* Adickes v. S. H. Kress & Co., 398 U.S. 144, 159 n. 20 (1970); 6 J. Moore, Federal Practice ¶56.2[2], at 2821-22 (3d ed. 1975). This Court has previously recognized the doctrinal changes effected by the 1963 amendment to the Rule. Lockhart v. Hoenstine, 411 F.2d 455, 458 (3d Cir.), *cert. denied*, 396 U.S. 941 (1969); Robin Constr. Co. v. United States, 345 F.2d 610, 613-15 (3d Cir. 1965).

10. First Nat'l. Bank v. Cities Service Co., 391 U.S. 253, 289 (1968) (footnote omitted).

factual matters, disputed or not, are immaterial to our decision. Reversal is therefore not merited, since summary judgment is improper only when there are disputed *material* facts. Teamsters Local 249 v. Bill's Trucking, Inc., 493 F.2d 956, 964 (3d Cir. 1974); Kiess v. Eason, 442 F.2d 712, 713 (7th Cir. 1971).[11]

The mere presence in the complaint of the allegation that Bethlehem caused Sound Ship's damages is no longer sufficient by itself for Sound Ship to avoid summary judgment. Because Sound Ship has failed to show, by affidavit or otherwise, that the required causal link exists between the alleged antitrust transgression and damage to Sound Ship, and because there are no disputed material facts, summary judgment was an appropriate method for disposing of the case.

IV.

The judgment of the district court accordingly will be affirmed.

11. The Supreme Court has advised that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles. . . ." Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962). *Accord*, Tripoli Co. v. Wella Corp., 425 F.2d 932, 939 (3d Cir.) (Freedman, J., disenting), *cert. denied*, 400 U.S. 831 (1970). However, that caveat was not meant to express a *per se* rule, White Motor Co. v. United States, 372 U.S. 253, 259 (1963), and the approach we take in this case, which obviates the need to scrutinize the parties' motive and intent, makes it inapplicable herein in any event.

APPENDIX "C"

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

CIVIL No. 112-73

SOUND SHIP BUILDING CORP.,
a New York corporation,

vs.

BETHLEHEM STEEL COMPANY (INCORPORATED)
a Pennsylvania corporation and
BETHLEHEM STEEL CORPORATION,
a Delaware corporation.

OPINION
(Filed January 8, 1973)

COOLAHAN, District Judge

This action and the presently pending motion for summary judgment by defendant Bethlehem Steel Corporation and the cross-motion for partial summary judgment as to liability by plaintiff Sound Ship Building Corporation concern the issue of the validity, under §1 of the Sherman Act, 15 U.S.C. §1, of a covenant between buyer and seller restricting for a 20-year period the uses to which real property can be put. Plaintiff argues that the covenant violates the Sherman Act whether tested by the per se or "reasonableness" standard of illegality. The Court disagrees. The per se standard is inapplicable to the facts of this case, and the covenant when measured by traditional reasonableness standards is not violative of the law.

Plaintiff Sound Ship Building Corporation (Sound), a New York corporation, was engaged in the construction and repair of non-self-propelled barges at its facility at College Point, New York. Its business was equally divided between barge construction and repair. In the New York City harbor area Sound was the sole business that constructed new barges, but was one of at least eleven businesses engaged in barge repair.

Bethlehem's primary business is the construction and repair of ocean-going vessels. Bethlehem does no barge construction, but does some barge repair work at its Hoboken, New Jersey, facility.

Prior to 1970 neither Sound nor Bethlehem was "aware" of the barge work of the other. Consequently, neither regarded the other as a present or future competitor.

In the early 1960s the ship building industry in the New York harbor was in a general state of decline.[1] During this period, Bethlehem sold all but one of its parcels of harbor-front property. Each deed contained a restrictive covenant similar to the one which accompanied the sale on August 20, 1964 of property located on Staten Island known as "Mariner's Harbor" to JML Trading Company (JML). JML is in the real estate business. In relevant portion the restrictive covenant in the Mariner's Harbor deed mandated that:

> The Grantee, for itself and its successors and assigns hereby covenants with the Grantor, and its successors and assigns, that no part of the Premises is to be used for the business of drydocking, building, repairing (including painting below the light load line), or converting ocean-going ships, ferry boats, or harbor craft; provided, however, this restriction shall not apply: (a) to the drydocking, building, repair or conversion of pleasure craft (yachts and similar small pleasure boats); or (b) to any such activities which

1. The barge repair business tends to be cyclical because it depends on the level of construction in the New York area.

are required to be conducted at the Premises in times of national emergency by governmental action. This covenant shall continue in full force and effect for twenty (20) years from the date of this deed, shall run with the land, and shall bind the Grantee, and its successors and assigns. The Grantee shall include the foregoing covenant in any lease or coveyance of the Premises or of any part thereof made by it during such period of twenty (20) years and shall include in each conveyance made of the Premises or any part thereof during such period a provision requiring the Grantee, its successors and assigns, to include this restriction in any subsequent conveyance made during such twenty-year period.

In 1969, five years after Bethlehem's sale of the Mariner's Harbor property, Sound learned that, upon expiration in 1972, its lease at College Point would not be renewed. Consequently in 1971 Sound began searching for a new site for lease or purchase. After reviewing approximately 30 possible alternatives, Sound determined that the only property "truly suitable" for its purposes was Mariner's Harbor. Sound's determination rested not only on financial and physical considerations but also on considerations of immediate availability.[2]

Accordingly, Sound, with JML's support, sought from Bethlehem a waiver of the restrictive covenant. Bethlehem initially refused,[3] but later offered to waive the restrictions and Sound agreed to pay Bethlehem a yearly

2. Although many sites were physically suitable, or could be made physically suitable for Sound's purposes (for example, by the erection of new bulkheads), each was rejected for a variety of reasons including cost. At Mariner's Harbor there was no need for alterations and Sound could have begun operations immediately.

3. Bethlehem's initial refusal was based at least partially on the determination that a waiver (a) would inevitably reduce its volume of repair business, and (b) would threaten its potential supply of skilled labor.

premium of approximately $19,000 for the remaining 13 years of the covenant. Sound refused to lease or purchase the property on these terms.

Sound ultimately leased property in Hoboken, New Jersey. The property lacked launching ways capable of utilizing Sound's new dry dock, upon which Sound was relying to increase its business. Sound agreed to pay at Hoboken an annual rent $14,770 higher than the combined cost of rent plus the yearly premium demanded by Bethlehem at Mariner's Harbor. Subsequent to leasing the property at Hoboken, Sound's financial condition deteriorated and it went out of business.

Section 1 of the Sherman Act provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal. . . ."[4] Courts have uniformly read the act to prohibit only unreasonable restraints.[5] Courts have distinguished "naked" covenants not to compete, deemed per se violations of the Sherman Act, from covenants merely ancillary to a main lawful contract. The latter, unlike the former, must be examined to determine if they are so unreasonable as to violate the antitrust laws. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899); *Orbo Theatre Corp. v. Loew's, Inc.*, 156 F. Supp. 770 (D.D.C. 1959), *aff'd*, 261 F.2d 380 (D.C. Cir. 1959), *cert. denied*, 359 U.S. 953 (1959).

The distinction rests upon a judicial recognition that a seller of a business or property may legitimately need to

4. Defendant argues that the facts disclose no contract, combination or conspiracy within the meaning of §1. In light of the Court's decision that any contract, combination or conspiracy which did exist was reasonable, it is unnecessary to rule on this issue.

5. *E.g.*, *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

protect himself by the use of reasonable means from injury at the hands of the buyer.[6]

A distillation of *Addyston* and its progeny identify four primary indicia of reasonableness of a restrictive covenant.[7]

1. The restraint is ancillary to the main purpose of a lawful contract.

2. The restraint is neither imposed by a party with monopolistic power nor fosters a monopoly.

3. The restraint is partial in nature and reasonably limited in time and scope.

4. The restraint is no greater than necessary to afford fair protection to the parties and not so extensive as to interfere with the interests of the public. *Schine Chain Theatres v. United States,* 334 U.S. 110 (1948); *Goldberg v. Tri-State Theatre Corp.,* 126 F.2d 26 (8th Cir. 1942); *Syntex Laboratories, Inc. v. Norwich Pharmacal Co.,*[8] 315 F. Supp. 45 (S.D.N.Y. 1970), *aff'd,* 437 F.2d 566 (2d Cir. 1970); *United States v. Columbia Pictures Corp.,* 189 F. Supp. 153 (S.D.N.Y. 1960); *Orbo Theatre Corp. v. Loew's*

6. Justice, then Judge, Taft, writing for the Court in *Addyston,* stated that

> . . . it was certainly reasonable that the seller should be able to restrain the buyer from doing him injury which but for the sale the buyer would be unable to inflict.

7. Profesor Handler has labeled the development of proper standards as the key problem before the courts in this area. H.J. Goldschmidt, "Antitrust's Neglected Stepchild: A Proposal for Dealing with Restrictive Covenants under Federal Law," 73 Colum. L. Rev. 1193.

8. These rules are stated with clarity in *Syntex Laboratories,* 35 F. Supp. at 56:

> . . . it is hornbook law that a covenant not to compete ancillary to the sale of a business . . . when reasonably limited as to time and territory, does not fall within prohibitions of the Sherman Act. The question . . . is whether the restraint is reasonably calculated to protect the legitimate interests of the purchaser . . . or whether it goes so far beyond what is necesary as to provide a basis for the inference that its real purpose is the fostering of monopoly. *Goldberg v. Tri-State Theatre Corp.,* 126 F.2d 26, 32 (8th Cir. 1942).

Inc., supra; United States v. Bausch & Lomb Optical Co., 45 F. Supp. 387 (S.D.N.Y. 1942), *aff'd* 321 U.S. 707 (1944).

When these standards are applied in light of the evidence and factual circumstances surrounding the Mariner's Harbor deed, the covenant is not unreasonable within the meaning of §1 of the Sherman Act.

1. The Mariner's Harbor covenant is ancillary to the main purpose of the contract—the lawful sale of property. Bethlehem underwent a general "house cleaning" of its harbor-front property motivated by economic conditions which made continuing maintenance of the property uneconomical. Plaintiff has alleged no facts to indicate that the prime purpose of the whole transaction was not the lawful sale of property.[9]

2. The covenant is sufficiently limited in scope and time. Although restricting many shipyard activities, the covenant is not all-inclusive, but rather, limited to specific types of harbor activity, and expressly provides exceptions for pleasure craft. Thus there are viable shipyard purposes to which the property can be put. Standing alone, a 20-year restrictive covenant is unreasonable.[10] The fact, however, that the covenant was imposed (a) by a seller who retained at close proximity a similar business interest (b) in a market where viable alternative sites were avail-

9. Although the impact of agreements not to compete can be great in industries, such as barge repair and construction, that are particularly dependent on the supply of trained personnel, and Bethlehem stated that one of the reasons weighing against its waiver of the covenant was a feared increase of competition for a limited supply of skilled workers, sufficient evidence has not been adduced to indicate that this was the principal motivation for the transaction.

10. There is little federal precedent for determining a covenant's reasonableness in terms of time and scope. In *Tri-Continental Finance Corp. v. Tropical Marine Enterprises,* 265 F.2d 619 (5th Cir. 1959), the Court of Appeals upheld a restrictive covenant which prohibited a purchaser of a vessel from using that vessel for the purposes of ferry transportation between Cuba and the United States for ten years. The court, citing Addyston, held such covenant to be reasonable in time and territory and thus not violative of §1.

able (c) during a period of economic decline in the business, enables the Court to find the covenant reasonable in time.

3. Plaintiff has not alleged facts to indicate that Bethlehem had monopolistic powers[11] in the barge construction or repair business at the time of the covenant's initiation nor adduced evidence that it was Bethlehem's intent[12] to develop such power or that in fact such has been the result at any time during the life of the covenant. *Schine Chain Theatres v. United States,* 334 U.S. 110 (1948), where the Supreme Court found unlawful a covenant not to compete, is distinguishable because that covenant was part of a series of covenants that formed a larger plan to monopolize.

Sound strongly urges that there can be no dispute as to Bethlehem's anticompetitive motives which were designed specifically for the result it had—the elimination of Sound.[13] In support of its argument Sound marshals internal Bethlehem memoranda, the core of which indicates Bethlehem's opinion that a waiver of the covenant would prejudice Bethlehem's work by enhancing the potential competitive position of another. Based on these

11. In *Carter Wallace, Inc. v. United States,* 419 F.2d 1374 (1971), the Court of Claims stated that it is not always necessary before a §1 violation could be proven to show an offending party's power in the market place if the motivation underlying its conduct is clear and such conduct has produced negative economic effects. In this matter, however, there must be interaction between all the elements before the true factor of any one element can be determined.

12. In *Goldberg v. Tri-State Theatre Corp.,* 126 F.2d 26 (8th Cir. 1942), the court stated that even if there were a combination to monopolize, as the defendant contended, the record failed to demonstrate that such monopolization was a motivating factor in the transaction of which the restrictive agreement was part.

13. Sound urges that the ultimate destruction of its business is "the most eloquent testimony that the covenant had exactly the anticompetitive impact it was intended to have." The Court is unable to accept this equation in light of the fact that Sound's profits increased during the first seven years of the covenant's life.

statements made in and about 1971 concerning the potential waiver in 1971 of the covenant, Sound leaps to the conclusion that through the initiation of the covenant in 1964 Bethlehem was seizing the opportunity to destroy Sound.[14] Plaintiff has blended events which cannot be mixed.

4. The restraints of the Mariner's Harbor covenant are not greater than necessary to afford protection to the parties and not so extensive as to interfere with the interests of the public. No facts have been alleged to indicate that the covenant in any way operates to deprive the public of adequate facilities at lower prices.[15]

Plaintiff vigorously urges that the Mariner's Harbor restrictive covenant falls within the category of agreements which have been condemned per se violations of §1 of the Sherman Act. In support of this position plaintiff argues that the covenant (a) is so pernicious a naked anticompetitive agreement that no step-by-step analysis of its reasonableness is necessary and (b) can be included with-

14. At the time the covenant came into force in 1964 the parties were unaware of the barge work of the other. Furthermore, with the addition of a 10,000-ton capacity floating dry dock in 1969, Sound's business potential as well as its physical needs in leasing or purchasing property changed drastically.

15. When a potential customer is excluded via a restrictive covenant from a regional shopping center, it generally means that he will be unable to locate in another center serving the same trade area since an alternative is not likely to exist. The lack of competition results in higher prices and poorer service for the public. This direct danger to the public, while very palpable in shopping centers, is unique to the type of industry and lease structure. Similar dangers are not inherent in the Mariner's Harbor situation where there are a number of existing competitors and a large number of possible alternative sites for new competitors and no apparent interference with the needs of the public. Furthermore in shopping center leases, the industrial structure allows the goals ordinarily reached by restrictive exclusionary covenants to be reached through the alternatives of a more narrowly drawn covenant. Plaintiff has offered no evidence to indicate that the alternatives of less restrictive covenants are available in the present matter. Note, "The Antitrust Implications of Restrictive Covenants in Shopping Center Leases," 86 Harv. L. Rev. 1201.

in the traditional categories of per se violations—horizontal and vertical price-fixing, agreements by competitors to divide markets, and group boycotts.[16] Although the Court agrees that certain restrictive covenants may be per se unreasonable and fit within the traditional classification of such violations, the determination of these issues to the Mariner's Harbor covenant is moot by virtue of the determination that the covenant is both ancillary to the main purpose of a lawful contract of sale and reasonable in its application.

The facts of this case are undisputed and the law is clear in its determination that the Mariner's Harbor covenant is not violative of §1 of the Sherman Act. Accordingly, plaintiff's motion for partial summary judgment is denied and defendant's motion for summary judgment is granted.

16. *E.g., White Motor Co. v. United States,* 372 U.S. 253 (1963).

APPENDIX "D"

15 U.S.C. §1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

APPENDIX "E"

15 U.S.C. §15

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws

may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.